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Supreme Court of the United States

October Term 1974

No. 313

WILLIAM F. BUCKLEY, NATIONAL REVIEW, INC., and M. STANTON EVANS,

Petitioners,

—against—

AMERICAN FEDERATION OF TELEVISION and RADIO ARTISTS,

Respondent.

No. 314

FULTON LEWIS III,

Petitioner,

—against—

AMERICAN FEDERATION OF TELEVISION and RADIO ARTISTS,

Respondent.

PETITION FOR REHEARING

Petitions for writs of certiorari were denied herein on December 23, 1974. Justice Douglas dissented in an opinion in which the Chief Justice concurred. Justice Marshall extended the time within which a petition for a rehearing might be filed until February 6, 1975.

Petitioners propose arguments not included in the original petition. In that petition we did not argue "government action" believing that subject adequately covered by the opinion of the Court of Appeals. Since the Court's order denying the petition, we have had an opportunity to read the Court's opinion in *Jackson* v. *Metropolitan Edison Co.*, 43 U.S. Law Week 4110, decided on December 23, the

same day that our petition was denied. We believe it is possible that some members of the Court may have been influenced by the *Jackson* opinion to conclude that there had been no "government action" in our case.

We also argue pre-emption differently, urging that *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274 (1971), be overruled or limited to cases in which the NLRB will grant relief.

POINT I

The First Amendment provides that

> **"Congress shall make no law . . . abridging the freedom of speech."**

NLRA § 8(a)(3), providing that dues may be required as a condition of employment is, in the context and as applied to commentators on public affairs, such a law.

The effect of § 9 of the NLRA is to force all employees of a given employer in a collective bargaining unit determined by the NLRB necessarily to be represented by a union collective bargaining agent.

§ 8(a)(2)—whatever it may authorize as regards membership as such—unquestionably authorizes that the employer and the union may agree that the employee pay dues as a condition of employment. As applied to commentators on public affairs § 8(a)(3) thus abridges their freedom of speech. They may have made otherwise satisfactory agreements with broadcasting companies, but are nevertheless prevented from speaking if the union dues have not been paid. When one considers the somewhat remote circumstances in which this Court has enforced freedom of speech on occasion, it is, we believe, inconsistent that so direct an interference with speech should be tolerated.

The Fourteenth Amendment provides that no State "shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The phraseology of the Fourteenth Amendment has led to numerous cases to determine whether or not action with which a state or state officer has some connection, amounts to "state action" for Fourteenth Amendment purposes. Many of these cases are cited in *Jackson*.

We believe that the body of law built primarily around the Fourteenth Amendment "state action" cases, with their discussion of "involvement", "encouragement", "insinuation", etc. has led to a failure to recognize an explicit violation of the First Amendment when not accompanied by circumstances under which the courts have tended to find "state action" despite the absence of action by the state in the literal sense.

Nevertheless, even in a case such as *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972), we have no doubt that, if the statute at issue there had in so many words authorized the licensee to make a choice as to whether or not it would provide service to blacks, this Court would have found state action. It was because the statute was wholly silent on the subject that there was no "state action".

In the present case, although Justice Douglas has shown the theory on which petitioners' speech has been abridged, we wish to add a few words in the light of *Jackson*. The tariff schedule in *Jackson* was *de minimis*. It had never received state attention; that part of it at issue consisted of a sentence or two lost in voluminous schedules.

In the present case there unquestionably is "government action", viz., the National Labor Relations Act. The Act is a widely debated statute that engaged the attention of

the nation when it was under consideration by Congress in the winter and spring of 1947. From the viewpoint of "action", the tariff schedule routinely acquiesced in by a state agency is not to be compared with § 8(a)(3) of the NLRA.

In *Jackson* the Court said:

> "If we were dealing with the exercise by Metropolitan of some power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one." (at 4112)

This Court has found that unions have governmental powers legislative in nature and therefore subject to constitutional limitations. In *Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192 (1944), the Court said that (page 198)

> ". . . constitutional questions arise . . . [when] the bargaining representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates . . ."

Again, in *American Communication Assn.* v. *Douds*, 339 U.S. 382 (1952), the Court emphasized the governmental nature of the power exercised by unions.

We would submit, however, that when a statute authorizes A and B to agree upon a contract which limits C's freedom of speech, the statute abridges C's freedom of speech. The right to continuous electric service is not freedom of speech.

In *Jackson* the Court said that it found no state action in *Moose Lodge* because there was "insufficient relationship between the challenged actions of the entities involved and

their monopoly status" (at 4112) and finds no greater connection in *Jackson*. In contrast, the NLRA authorizes, fosters, and encourages the union shop, the very subject matter of the complaint, and thus constitutes state action to raise the abridgment of your petitioners' speech to constitutional significance, if encouragement be necessary as well as authorization.

§ 7 of the NLRA expressly states that § 8(a)(3) authorizes a union shop. Thus, § 7 in authorizing workers to organize and engage in collective bargaining, or to refrain from doing so, specifically provides that "the right to refrain from any and all such activities" is subject to an exception "to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as *authorized in Sec. 8(a)(3)*." (Emphasis added.)

The first proviso of § 8(a)(3) declares: "Provided that nothing in this act, or in any other statute of the United States, shall preclude an employer from making an agreement for a union shop."

Obviously this language, nullifying any other statute of the United States in conflict with the authorized union shop goes further than to create an exception to the unfair labor practices defined in the Act. The very reason for removing the conflict of other statutes of the United States is because some of them declare a public policy hostile to any form of compulsory union membership. One example is the declaration of policy in the Norris-Laguardia Act, 29 USC 102.

The government action present in the NLRA's authorization of the requirement of dues as a condition of speech is clearly distinguishable from the pervasive state regulation of liquor sales in *Moose Lodge* or the grant of a certificate of public convenience and necessity to a private utility com-

pany in *Jackson*. The courts have uniformly held that merely because a private company is in some way regulated by the state it does not follow that all of its actions are impressed with state action. In the NLRA's regulation of the union shop there is authorization, encouragement and fostering of the very subject matter of the complaint which presents a totally different issue from the one raised by the mere presence of general regulation however extensive in scope.

The First Amendment does not forbid laws which "prohibit" freedom of speech. It uses the word "abridge". We fail to see how a statute which authorizes a series of actions the ultimate effect of which may well be, and indeed ordinarily is, to require the payment of union dues as a condition of speech by commentators on public affairs, can be said not to "abridge . . . the freedom of speech," and be subject to attack by a victim of such abridgement.

Petitioners' objection is of course to prior restraint of speech. Petitioners would welcome an action at law by the union to collect whatever dues it may think itself entitled to.

In conclusion: This is not a case of deciding whether there has been "state action" in the Fourteenth Amendment sense. It is a First Amendment case and the First Amendment is worded differently from the Fourteenth. Congress has undoubtedly "made a law"; the only question is whether or not it is one "abridging . . . the freedom of speech". When Congress makes a law authorizing two parties to enter into a contract by which a third party is barred from speaking on the air unless he meets conditions which the first two parties agree upon, there has been petitioners submit, an abridgement of the freedom of speech. Although we do not regard it as essential to jurisdiction, the law not only authorizes but encourages such a contract.

POINT II

The Court should reconsider and overrule *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274 (1971), or at least limit its pre-emption doctrine to cases in which the Board can and will provide relief; cf. dissenting opinion of White, J., at page 328.

The courts below should be permitted to consider on the merits petitioners' applications for declaratory judgments that the relevant sections of the Codes of Fair Practice (§ 84 of the TV Code [Buckley]; § 57 of the Radio Code [Evans and Lewis]) are invalid as applied to them. To achieve this result it would be necessary to overrule or limit *Lockridge*, assuming, as we must, that our petition for certiorari did not successfully distinguish it.

For reasons apparent from the ensuing argument this point is addressed with special emphasis to Justices Powell and Rehnquist.

The doctrine of pre-emption was first extended to disputes between unions and employees by *Lockridge*, decided June 14, 1971. This decision was by a vote of five to four. All of the four dissenting justices remain members of the Court; of the majority of five, only three remain. The other two justices now serving are Justices Powell and Rehnquist appointed to the seats of the late Justices Black and Harlan, who retired shortly after the decision. Thus insofar as the present Court is concerned, assuming that their views remain unchanged, four justices are opposed to pre-emption as applied to such disputes whereas only three favor it; two have not expressed their opinion.

In view of the fact that this doctrine was reached so recently, and by such a bare majority, petitioners submit that it is appropriate that it be reconsidered by the present

Court. The Court has, following changes in membership, customarily reconsidered recent decisions. We believe that the present is a suitable occasion for doing so.

We do not propose to reargue the doctrine of pre-emption of union-employee disputes in this petition. We believe that the dissenting opinions of Justices Douglas and White* state as cogently as possible the arguments against the pre-emption of such disputes. We adopt those dissenting opinions for purposes of the present petition for our thesis that *Lockridge* should be overruled. We submit that they are more persuasive than the Court opinion and rely upon those dissenting opinions for our presentation of our view that the doctrine of pre-emption should not be applied to union-employee disputes.

The present case illustrates with exceptional force the validity of the dissenting opinions of Justices Douglas and White in *Lockridge*, and the unfairness to the employee situated as petitioners, in limiting him to National Labor Relations Board in disputes with the union arising under the Act when the Board is unable or unwilling to grant relief.

> IN THE COURT OF APPEALS AND IN THIS COURT THE UNION CONCEDES THAT PETITIONERS CAN NOT, AS A MATTER OF LAW IN THE ABSTRACT, BE REQUIRED TO BE MEMBERS. NEVERTHELESS, BECAUSE OF THE CHARACTERISTICS OF THE INDUSTRY PETITIONERS MAY NOT BRING UNFAIR LABOR PRACTICE CHARGES, AND AS THE BOARD DOES NOT ENTERTAIN APPLICATIONS FOR DECLARATORY ORDERS UNDER § 5(e) OF THE ADMINI-

* The Chief Justice concurred in Justice White's dissenting opinion (page 309); Justice Blackmun dissented "for the basic reasons set forth by Mr. Justice Douglas and Mr. Justice White in their respective dissenting opinions" (page 392).

STRATIVE PROCEDURE ACT, THE UNION, ACTING THROUGH THE EMPLOYERS, CONTINUES TO COMPEL MEMBERSHIP. PETITIONERS, FORCED INTO CONTRACTS AGAINST THEIR WILL, ARE LEFT WITHOUT ANY TRIBUNAL TO WHOM TO APPLY FOR RELIEF. HENCE THE DOCTRINE OF PRE-EMPTION SHOULD NOT BE APPLIED; CF. DISSENTING OPINION OF WHITE, J., IN LOCKRIDGE AT PAGE 328.

It is of course familiar law that a member can not be compelled to remain a member, and the union so concedes. What the union does, to avoid this problem, is to require the employer broadcasting companies to employ only members "in good standing." Cf. 4b-5b; 25c-26c.* Hence it is impossible to get a job unless the performer is a union member. The employer simply will not engage a performer unless he is a union member. Moreover employment is for short terms, often single appearances only, and even longer term contracts contain 13 week cancellation clauses. The member thus has no regular job in which he can be reinstated should he resign from the union and then be discharged. The Board's unfair labor practice procedure is thus useless to him, and in any event, in so far as commentators on public affairs are concerned, would deny him speech during the proceeding—an abridgment of freedom of speech in itself.

Sympathetic with petitioners' dilemma the Court of Appeals, declared the union guilty of "misrepresentation" and "coercion" (15b), but said that Buckley "should have taken his cause to the National Labor Relations Board, an administrative agency fully capable of granting declara-

* The requirement is that the employer-broadcasting companies employ only "members . . . in good standing" is § 84 of the TV Code (Buckley) and § 57 of the Radio Code (Evans and Lewis).

tory relief if circumstances warrant such relief. See 5 U.S.C. § 554(e)" (16c).

§ 554(e) (§ 5[e] of the Administrative Procedure Act), thus referred to by the Court, provides:

> "The agency, with like effect as in the case of other orders, and in its sound discretion may issue a declaratory order to terminate a controversy or remove uncertainty."

Although the Act authorizes the Board to make "rules and regulations as may be necessary to carry out the provisions" of the Act (§ 6), it has issued rules "for declaratory orders in only a few situations". White, J. dissenting in *Lockridge* at page 328. Justice White added, footnote 6 at page 328:

> "The use of declaratory orders in unfair labor practice proceedings is non-existent, and the same seems to be true for determining whether or not activities arguably subject to § 7 are protected.*"

Thus the National Labor Relations Act procedure suggested by the Court of Appeals does not in fact exist. Conceding arguendo that the Board would have jurisdiction to issue a declaratory order in such a dispute as this, it has chosen not to exercise it, and petitioners are left without relief.

In his dissent in *Lockridge* Justice White added at page 328:

> "Surely the policy of seeking uniformity in the regulation of labor practices must be given closer scru-

* The only rules which the Board has issued respecting declaratory orders relate to the situation when an unfair labor practice charge and a representation case respecting the same employer are contemporaneously on file in the same regional office. 29 CFR §§ 102.105-102.110.

> tiny when it leads to the alternative 'solutions' of denying the aggrieved party a hearing . . ."

Justice White's remark is particularly in point. To apply *Lockridge* here will defeat the intention of Congress that there be a uniform labor policy. In the present instance, so far as substance is concerned, there can be and is no question what that policy is, viz., that members of collective bargaining units who pay dues and fees may resign their union membership at their pleasure.* In this particular instance, however, the characteristics of the industry are such that the unfair labor practice charge is unavailable as a practical matter and the NLRB refuses to exercise its declaratory order jurisdiction. Hence television and radio employees will be in a different and non-uniform category from all other employees; they will be unable to resign from their union even if paying dues and fees. This result is, we submit, to stand the doctrine of pre-emption on its head.

Another point made by Justice White is also applicable here. Referring to *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1 (1957), followed by NLRA § 14(c), he forcefully demonstrated that it was not the intent of Congress that there be "a vast no-man's land, subject to regulation by no agency or court." 403 U.S. 315. Such of course will be the situation if the decision of the courts below are upheld.

The situation here is the more acute in that the union concedes that petitioners have the right to resign, but blocks relief by claiming the absence of a forum able to provide a remedy.

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* Subject to legitimate union rules.

The full membership requirement is not a mere matter of union disciplinary sanction. The requirement sets up a compulsory association as a prior condition of speech.

We do not stress arguments made in the original petition, viz., that these petitioners have been, according to the Court of Appeals, subjected to "misrepresentation" and "coercion", unlike the employee in *Lockridge* who was only the victim of "honest, mistaken conduct"; and that the expertise of the NLRB can hardly be needed as to a legal issue settled in 1954 (*Radio Officers Union* v. *NLRB*, 347 U.S. 17 (1953)).

CONCLUSION

The petitioners request for a writ of certiorari should be granted.

Respectfully submitted,

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February, 1975